Civil Liability Reform

The Problem

Frivolous lawsuits and excessive noneconomic damage (pain and suffering) awards cost Washington consumers and taxpayers millions of dollars annually and threaten access to affordable health care, affordable housing and vital services. People are losing their jobs because companies, especially small firms, are going out of business.

The Solution

During the past two sessions, Senate Republicans introduced meaningful legislation to bring stability, predictability and a sense of fairness back into the civil justice system. The Senate approved the SRC omnibus tort reform bill (ESSB 5728), which included caps on noneconomic damages in cases of medical malpractice, only to be blocked in the House Judiciary Committee by the Chair, Rep. Pat Lantz.

What are noneconomic damages?

The term "noneconomic damages" can be confusing. Capping noneconomic damages applies only to damages awarded for intangibles, such as pain and suffering, mental anguish, or loss of companionship.

Capping awards for noneconomic damages does not deny justice to injured persons. Injured persons are STILL entitled to:

- Payment of all future wages, with a built-in assumption for inflation and promotions;
- Payment of all medical bills, including prescription drugs;
- Payment of all necessary custodial care, including long-term care and nursing home care;
- Payment of all incidental costs related to the injury, such as special vehicles to accommodate wheelchair access; and
- Payment of any in-home care equipment needed.
- Attorney fees may also be paid, depending on the case.

Background

State agency self-insurance costs for tort liability were estimated to be $173 million for the 2003-05 biennium, or about $110 per Washington family. This could fund 7,000 new college enrollments; the entire general fund cost of Western Washington University; or a 15 percent increase in beginning teachers' salaries *(Senate Ways & Means).*

The median jury award in medical malpractice cases increased from $500,000 in 1995 to $1 million in 2000 *(www.juryverdictresearch.com).*

The average person pays $1,200 per year in “Lawsuit Taxes” – or added liability costs passed on to the consumer by insurance companies, manufacturers and other businesses. *(www.cala.org/cause.html).*

Two-thirds of the states limit the amount of damage awards against the state. About 80 percent of the states have total or partial immunity. The same number has immunity from parolee conduct. Only a few states, like Washington, have minimal immunities and no limits on damages *(Senate Ways & Means).*

Twenty percent of Washington’s obstetricians have already stopped practicing and 55 percent said they would drop obstetrics if their annual malpractice premiums reached between $40,000 and $70,000. The average OB-GYN in our state already pays $41,000 in medical liability premiums – up 287 percent from only a decade ago.

According to the Washington State Medical Association (WSMA), medical malpractice insurance costs are having a growing impact on Washington’s health care delivery system. Between 1998 and 2002, more than 500 doctors left the state — an increase of 31 percent from previous years. Between 1996 and 2001, the number of doctor retirements increased 50 percent over previous years and the average age of retirement dropped from 63 to 58. Many others are limiting their practices, especially in high-risk fields like obstetrics and neurosurgery.

From 1976 to 2000, medical malpractice insurance premiums in the U.S. rose 505 percent. In California (which has a cap on noneconomic damages), during the same period medical malpractice insurance premiums rose only 167 percent.

The annual cost of America’s tort system exceeded $165 billion in 1999.

Washington malpractice claims in 2001 cost insurers $44.7 million. This cost is passed on to health care providers and to patients, not only in the increased cost of health care, but in reduced access.

The House passed four bills in 2004 under the guise of medical malpractice reform, but they fall far short of needed changes. They will not bring down the cost of malpractice insurance and were not voted on by the Senate.

EHB 1926 – This measure limits the use of expert witnesses by “each side.” If multiple parties on the same side cannot agree on one expert for an issue, the court may allow more than one expert.

EHB 1927 – This measure provides a 90-day notice of intent to sue, but merely restates the mandatory mediation statue without closing the loophole that allows for exceptions.

EHB 1928 – This measure eliminates the requirement that any entity causing a claimant’s damages must be assigned a percentage of the total fault; eliminates a health care provider’s joint liability for noneconomic damages; and limits the liability of hospitals and health care providers for the acts or omissions of their agents.

EHB 1929 – This measure reenacts the 8-year statue of limitations on malpractice claims and attaches goals and rationale. In 1998, the Washington State Supreme Court ruled there was no relationship to a legislative goal and the provision violated the constitutional principle of the equal protection.

Tort Reform Poll Results

Evans/McDonough and Moore Information, nationally respected pollsters of public opinion, conducted a survey on tort reform from October 24 through October 26, 2003. The survey consisted of telephone interviews of 600 perfect voters in Washington state. The overall margin of error for the poll was +/- 4.0 percentage points.

The survey found that:

- 72 percent support limits on the amount of money juries can award for non-economic damages.
- 66 said they would be more likely to support a candidate for the Legislature who supports limits on non-economic damages in personal injury cases.
- After hearing the difference between economic and non-economic damages, a majority of Republicans (78 percent), Independents (55 percent) and Democrats (52 percent) said they would support legislation that limits to $250,000 the amount of non-economic damages juries can award in medical malpractice and personal injury lawsuits.
- Fully three-quarters (75 percent) think juries have gone wild, awarding huge amounts, and think we need limits to restrict those excessive payments.
- 56 percent describe the issue of medical malpractice lawsuits in Washington today as a crisis or major problem.
- A vast majority of voters (86 percent) agree that when damages are awarded against several defendants, each should only have to pay the percentage for which the court found the defendant responsible.

SRC Wins - 2003

SHB 2039 – General construction liability relief was signed into law on April 21, 2003. This measure provides relief by creating a list of “affirmative defenses” for contractors. Affirmative defenses for which a contractor may not be held liable include natural disasters, owner-made alterations and failure to conduct maintenance. This issue was also part of the SRC omnibus tort reform bill (ESSB 5728).

SRC Wins—2004

HB 2485 — A cap on interest rates on tort judgments was signed into law on March 26, 2004. The interest rate on tort judgments is to be determined by adding two points to the 26-week Treasury Bill rate. This provision was part of the SRC omnibus tort reform bill (ESSB 5728).

SRC Goals

✓ **Pass Omnibus Tort Reform:**

Put a cap on noneconomic damages.

Replace “joint and several liability” with “proportionate liability,” limiting awards to actual responsibility.

Protect employers who give honest, work-related information about a former employee.

Specify that interest on a judgment against the state or a local government does not begin to
accrue until the Legislature has made the appropriation necessary to pay the judgment.

Allow juries to know if an injured person was wearing a seatbelt at the time of an accident.

Limit government liability to $1 million; $2 million for more than one claim arising out of a single incident.

✓**Act on Initiative 330 – Medical Malpractice Reform (WSMA)**

This measure caps noneconomic damages at $350,000; limits attorneys’ fees; requires advance notice of lawsuits and tightens the statute of limitations for filing cases. In addition, it limits the use of “joint and several liability.” This initiative to the Legislature must be certified with at least 197,734 registered voter signatures by 5 p.m. Dec. 31. Trial lawyers are pushing I-336, a measure that seeks to root out bad doctors and force malpractice insurance companies to open their books.